

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENOBES TRIPLETT,

Defendant-Appellant.

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UNPUBLISHED

September 30, 2008

No. 279969

Wayne Circuit Court

LC No. 06-014386-01

Before: O’Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

After a bench trial, defendant Kenobes Triplett was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At a Narcotics Anonymous meeting, Dana Troup told an acquaintance, Ricky Swanigan, that she knew someone who could sell him sneakers at a good price. Troup and Swanigan went to a house in Detroit, where Troup introduced Swanigan to defendant. Other men were present in the room, but Swanigan did not meet them. Defendant stepped out of the room and Troup left the home. When defendant returned to the room, Swanigan heard the “racking” of a gun, and defendant announced, “You know what time this is. Give it up.” Defendant held an automatic pistol. The other individuals also held guns, but Swanigan kept his eyes on defendant. Although Swanigan tried to tell defendant that he did not have any money, someone went through his pockets. Swanigan had \$400 in cash and his cellular telephone in his pockets. He was also wearing rings and bracelets. The man rummaging through Swanigan’s pockets dumped the money and telephone on the floor. Swanigan took off his jewelry, dropped it on the floor, and jumped through an open window. Swanigan began to run. He heard shots, but continued running. Eventually, he found a public telephone and called the police. When the police arrived, he took them to the home.

A few days later, Swanigan met with the investigating officer. The officer showed Swanigan a picture of Troup, who Swanigan immediately identified. Swanigan also viewed a black and white photograph array including defendant’s photograph. Swanigan stated that one photograph (which was of defendant) stood out, but he had difficulty conclusively identifying the subject of the photograph because the photograph was distorted. Swanigan asked to see a color photograph of that individual. The officer took an image of defendant from the Michigan

Offender Tracking Information website (OTIS), cropped it to show only defendant's image, and showed it to Swanigan.<sup>1</sup> Upon seeing the photograph, Swanigan identified defendant as the perpetrator. Swanigan stated that it was "like seeing him all over again with that gun in his hand."

On appeal, defendant argues that the photographic array was impermissibly suggestive, and thus the trial court should not have permitted complainant to identify defendant at trial. Defendant did not raise this claim below. Therefore, the claim is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763–764, 774; 597 NW2d 130 (1999).

We find that the trial court did not err in permitting Swanigan to identify defendant at trial.

If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification. [*People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).]

A lineup or showup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602, 603–604; 684 NW2d 267 (2004). The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Kurylczyk*, 443 Mich 289, 306, 311–312 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). "The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *Id.* at 306. Relevant factors to consider include (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of a prior description from the victim, (4) the witness's level of certainty at the time of the pretrial identification, and (5) the amount of time between the crime and the confrontation. *Colon*, *supra* at 304–305.

Under the circumstances, defendant cannot show that the trial court erred when it permitted the prosecution to present Swanigan's identification of defendant. The pretrial identification procedure was not unduly suggestive. Defendant does not maintain that he was singled out in the black-and-white array. No evidence suggests that the officer singled out defendant's initial photograph or indicated that the robber's picture was in the array. Swanigan chose defendant's photograph from the initial array before he asked to see a better photograph to

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<sup>1</sup> Apparently, this photograph was a color version of the black-and-white photograph of defendant included in the original line-up.

confirm the identification. To the extent that defendant suggests that Swanigan saw his OTIS information sheet when he was shown the color photograph, this assertion is not clearly supported by the record.

Even if we treated this as a situation in which a witness was shown a single photograph, which is considered a suggestive identification procedure, *Gray, supra* at 111, we would nevertheless conclude that the identification was not unduly suggestive. A review of the factors listed above supports the trial court's decision to admit the identification. This was not a quick, random encounter. Troup introduced Swanigan to defendant and Swanigan later kept his eyes on defendant during the robbery, to the extent that he admitted ignoring other people in the room. Swanigan was undoubtedly paying attention to defendant's features during this personal encounter. He was also very certain of his identification when shown the clearer photograph. Further, the time period between the robbery and the identification was not long. Under the totality of the circumstances, defendant cannot clearly show that the identification procedure was so suggestive that it led to a substantial likelihood of misidentification.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Michael R. Smolenski  
/s/ Elizabeth L. Gleicher